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Nos. 71-1691, 71-1690

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

WILLIAM J. RASMUSSEN, D.B.A. SARIVAL GUERNSEY FARMS, PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

MARLENE L. KRESSE, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

On Petitions For Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

JOHN B. CARROLL, Attorney
Carroll & Carroll
918 Onondaga Savings Bank Bldg.
Syracuse, N. Y. 13202

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.
(5524)

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

The government brief and the Ninth Circuit decision maintain Congress has specifically withdrawn the right to Court review by others than handlers, and as to handlers Congress required they must exhaust administrative remedies.

There is nothing in the act that so provides.

These views turn upon an interpretation of *United States* v. *Ruzicka*, 329 U.S. 287, 67 S. Ct. 207 (1946) which has over the years spawned many children. (Government brief page 7).

From this case the government infers that congress intended handlers challenge actions of the secretary only via adminstrative proceedings.[1]/

It is further reasoned that this being true of handlers, Congress must have intended that others have no right to Court review at all because a right to direct court access would be inconsistent with the exclusive administrative review requirements governing handlers.

These points were urged by the Government upon the Fifth Circuit in *Price* v. *Hardin* 425 F (2) 1137, and upon this court in an application for Certiorari, (Cert. denied 335 U.S. 813) without success.

It appears that Ruzicka which was decided in 1946 before the Administrative Procedure Act, has been left behind in the evolution of the Doctrine of standing, if indeed it was used for the purposes intended.

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[1]/As pointed out in the Rasmussen Petition page 11-12 the governments interpretation of Ruzicka is out of harmony with the prior decision of *Stark* v. *Wickard,* 321 U.S. 288, 64 S. Ct. 559, and the recent use of *Stark* v. *Wickard* (Supra) by this court in *Zuber* v. *Allen,* 396 U.S. 168, 90 S. Ct. 314, 327 where *this court recognized Stark* (Supra) *and Rock Royal* (*307 U.S. 533, 560, 561, 59 S. Ct. 993, 1006, 1007*) *Rock Royal was an original suit in District Court without prior resort to an adminstrative agency.* Congress itself did expressly provide for the consumer and required the Secretary "to protect" the consumer interest (7 USC 602), and did not itself make mandatory prior to an adminstrative agency, but used at 7 USC 608c 15 (A) the word "may" institute proceeding. By the latter Administrative Procedure Act Congress did supply right of court review not expressly given in the early Agricultural Adjustment Act of 1937. The acts are in harmony, and the requirement of prior handler administrative proceedings before the Secretary is a matter of Court policy.

Certiorari is needed to clarify the role of Ruzicka in light of the newer decisions and to eliminate the conflict in principle between the Circuits.

Certiorari should also be granted because the government when charged on uncontradicted evidence with clearly ultra vires activities, has made no effort whatever to explain or justify to this court the legality of its action. This lack of legality was raised in the Petitions for Certiorari.

Indeed its difficult to see how the secretary could justify his actions since the Congress specifically forbade him from "in any manner" 7 USC 608c 5g limiting the flow of milk products into a marketing area, and this court has heretofor warned the secretary that he must obey this command and cease monopolitic regulations for private benefit. (*Lehigh Valley Cooperative Producers* v. *Freeman* 370 U.S. 93, 82, S. Ct. 1168 (1962) 1177-1180).

The record which stands uncontradicted indicates that he has levied a tax for private benefit equal to 40% of the retail price of the ultimate product which is a mountainous barrier.

This tax will have the obvious effect of limiting the marketing of a competing product. In fact that was its purpose and intent.

It is also important that Certiorari be granted because the within claim arose November 1969 and the Petitioners are faced with a Statute of Limitations of two year duration (See 7 CFR 1000.6 Appendix A attached hereto).

It is therefore, unlikely, despite the government representations at page 7 of their brief, that a future administrative proceedings will be of realistic benefit to either the consumer or handler in this case.

The scope of consumer participation advanced by the government for consumers in general would leave them without the right to initiate an Administrative Review proceeding and therefore without a right of recourse to courts. It would leave them without a right to appeal from any proceeding in which they were allowed as interveneors. It would leave them without the right to make a record, to subpoena of witnesses, or submission of documents and would deprive them the right of cross examination of witnesses. Interveneors rights are limited to briefs and argument (C7 CFR 900.57 Appendix B attached hereto.)

CONCLUSION

For the reasons advanced it is respectfully requested that Certiorari issue.

Respectfully submitted,

JOHN B. CARROLL
918 O.C.S.B. Building
Syracuse, New YOrk 13202

APPENDIX A

§ 1000.6 Termination of obligations.

The provisions of this section shall apply to any obligation under the order for the payment of money:

(a) Except as provided in paragraphs (b) and (c) of this section, the obligation of any handler to pay money required to be paid under the terms of the order shall terminate 2 years after the last day of the month during which the market administrator receives the handler's report of receipts and utilization on which such obligation is based, unless within such 2-year period, the market administrator notifies the handler in writing that such money is due and payable. Service of such written notice shall be complete upon mailing to the handler's last known address and it shall contain but need not be limited to the following information:

(1) The amount of the obligation;

(2) The month (s) on which such obligation is based; and

(3) If the obligation is payable to one or more producers or to a cooperative association (except an obligation to be prorated to producers under an individual handler pool), the name of such producer (s) or such cooperative association, or if the obligation is payable to the market administrator, the account for which it is to be paid;

(b) If a handler fails or refuses, with respect to any obligation under the order, to make available to the market administrator all records required by the order to be made available the market administrator may notify the handler in writing within the 2-year period provided for in paragraph (a) of this section, of such failure or refusal. If the market administrator so notifies a handler, the said 2-year period with repect to such obligation shall not begin to run until the first day of the month following the month during which all such records pertaining to such obligation are made available to the market administrator;

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under the order to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation, on the part of the handler against whom the obligation is sought to be imposed; and

(d) Unless the handler files a petition pursuant to section 8c (15) (A) of the Act and the applicable rules and regulations (7 CFR 900.50 et seq.) within the applicable 2-year period indicated below, the obligation of the market administrator:

(1) To pay a handler any money which such handler claims to be due him under the terms of the order shall terminate 2 years after the end of the month during which the skim milk and butterfat involved in the claim were received; or

(2) To refund any payment made by a handler (including a deduction or offset by the market administrator) shall terminate 2 years after the end of the month during which payment was made by the handler.

APPENDIX B

§ 900.57 Intervention.

Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the presiding officer, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.